IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1204

STEPHEN EARL SQUIRE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

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OCTOBER TERM, 1973

No.

STEPHEN EARL SQUIRE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Virginia entered on October 8, 1973, affirming an order of conviction and sentencing entered by the Corporation Court of the City of Charlottesville, Virginia on November 15, 1972.

Opinion Below

The opinion of the Supreme Court of Virginia is reported at 214 Va. 260 (1973). It is set forth in the appendix, *infra*, pp. 2a-6a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on October 8, 1973. On January , 1974, Mr. Chief Justice Burger extended the time for filing this petition for certiorari to and including February 5, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether Virginia's disorderly conduct statute is unconstitutionally vague and overbroad on its face and as applied?

2. Whether a juror who states that he believes that either a police officer or a university official is inherently more credible than an anti-war demonstrator should have been struck by the trial judge for cause?

3. Whether, on a trial de novo, a court of record may hear evidence of alleged offenses of which the defendant was specifically acquitted in the Court not of record below consistent with the double jeopardy clause of the United States Constitution?

Statute Involved

Va. Code Ann. §18.1-253.2 (Cum. Supp. 1972) provides as follows:

> If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the

preceding section (§18.1-253.1), or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.

Statement of the Case

On April 29, 1972, Petitioner appeared at Scott Stadium on the grounds of the University of Virginia in Charlottesville, Virginia, to engage in a protest against the ROTC program at the University of Virginia. An ROTC parade was scheduled to take place and Petitioner carried a placard saying "In Vietnam we killed millions to avoid a bloodbath," or words to that effect.

A few minutes before the parade was to begin, Petitioner seated himself on the front wall of the stadium and faced the audience with his sign. Dean Alan Williams, Vice President in charge of student affairs at the University of Virginia, approached Petitioner, requested that he leave and tore his placard from his hands. Petitioner attempted to retrieve his placard and a short scuffle ensued. Petitioner was arrested and charged with disorderly conduct.

At his trial in the Municipal Court for the City of Charlottesville, on May 11, 1972, before the Honorable E. C. Wingfield, Petitioner was found guilty. The Court specifically stated that the reason he was guilty was the mere fact that he had carried a sign accusing the military of murder. Petitioner appealed to the Corporation Court of the City of

Charlottesville. On voir dire examination, one prospective juror admitted he believed police officers and university officials were inherently more credible than anti-war demonstrators. The trial judge refused to strike the prospective juror for cause and he sat as a juror during the trial.

Despite Petitioner's timely objection to the constitutionality on federal and state grounds of Virginia's disorderly conduct statute, and his objection to being tried for anything more than displaying his sign, Petitioner was convicted and sentenced to serve a term of four months in jail and to pay a fine of $600.00.

REASONS FOR GRANTING THE WRIT

I.

The Virginia disorderly conduct statute is unconstitutionally vague and overbroad.

Virginia's disorderly conduct statute, *Va. Code Ann.* §18.1-243.2 (Cum. Supp. 1972), raises two substantial constitutional problems in the instant case.

First, on its face and as interpreted by the Supreme Court of Virginia, the statute is vague and overbroad and thus constitutionally invalid. *Connally v. General Construction Company*, 269 U.S. 384, 391 (1931); *Carlson* v. *California*, 310 U.S. 106, 112 (1940).

Virginia's statute makes it a misdemeanor to behave in a "riotous or disorderly manner in any street, highway, public facility or any other public place..." But the statute does not tell us what constitutes riotous or disorderly conduct. This broad statute would be constitutionally suspect without interpretation by the Supreme Court of Virginia. *Severson* v. *Duff*, 322 F. Supp. 4 (M.D. Fla. 1970). The Supreme Court of Virginia, far from limiting the broad and uncertain sweep of the statute, has instead made it more vague. "One can no more undertake to define disorderly conduct than he can misdemeanor, nuisance, police power or insulting words." *Collins* v. *City of Norfolk*, 186 Va. 1, 41 S.E. 2d 448 (1947). Such a non-finding brings the Virginia statute plainly within the rule of *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

The Virginia Supreme Court has gone further, however, and found that disorderly conduct is "behavior that tends to corrupt public morals or outrage the sense of decency..." *Hackney* v. *Commonwealth*, 186 Va. 188, 45 S.E. 2d 41 (1941). It is much this kind of standard that this Court found impermissible in *Cohen* v. *California*, 403 U.S. 15 (1971). See also, *Severson* v. *Duff, supra.*

The second problem raised by the statute grows out of Petitioner's attempts to limit the sweep of the statute by jury instructions which would acknowledge the First Amendment problems raised by the case. The Commonwealth of Virginia was granted an instruction defining "disorderly conduct" as "behavior that tends to disrupt public peace and good order." The instruction granted violates the rule that prohibited activity must necessarily rise far above "public inconvenience, annoyance or unrest." *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). This is especially true since Petitioner offered instructions which would have defined "disorderly conduct" as that which is "turbulent, riotous, or in breach of peace." This instruction was refused by the trial court, as well as other instructions submitted by Petitioner recognizing the First Amendment nature of the case. *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

II.

Juror Bernet should have been struck by the Court for cause.

On voir dire examination, Juror Bernet said that either a police officer or a University official was inherently more credible than an anti-war demonstrator. Although he said later that he could have given Petitioner a fair trial, he should have been struck for cause, since the case directly involved the Petitioner, an anti-war demonstrator, in an act of demonstration against the war in Vietnam.

This Court has ruled that Due Process requires that the defense attorney be permitted to inquire into a juror's potential prejudice against the defendant. *Ham* v. *South Carolina*, 409 U.S. 524 (1973), and the Third Circuit has reaffirmed that this rule must be applied when testing the relative weight to be given to witnesses' testimony. *United States* v. *Robinson*, 14 Cr. L.R. 2088 (3rd Cir. Sept. 26, 1973).

It is well settled in the federal courts that such prejudices must result in the jurors' being struck for cause. *Chavez* v. *United States*, 250 F. 2d 816 (10th Cir. 1968); *Sellers* v. *United States*, 217 F. 2d 475 (D. C. Cir. 1959).

In rebuttal to argument by defense counsel that Juror Bernet should be struck for cause because of prejudice against anti-war demonstrators, the prosecuting attorney stated to the Court:

> I see nothing wrong with a juror who has his prejudices—this is the purpose of having a jury, is to get a cross section of people so that prejudices will be balanced against each other.
>
> Trial Transcript, October 13, 1972, p.7.

This Court must make it clear that, not only may counsel be permitted to probe for such prejudices, but that a defendant is entitled to have prejudices cured by striking for cause.

III.

The failure of the Court of record to exclude evidence of the behavior of which petitioner had been acquitted in the Court not of record is a violation of the doctrine of collateral estoppel as embodied in the principle of double jeopardy.

In his trial on May 11, 1972, in the Municipal Court for the City of Charlottesville, Petitioner was convicted of disorderly conduct. In announcing his decision from the bench, the judge, the Honorable E.C. Wingfield, stated the following findings of fact, and conclusions of law supporting his finding of guilt.

> COURT: I might say this, there is a lot of evidence in here that has been relevant and a lot of it has been irrelevant but I'm drawn to this conclusion from these facts. There was a sign that said either "kill" or "murder" and murder is a right serious word. To display a sign in a place that people have got to look at it, accusing the military of murder is very likely to cause some disturbance. It is calculated to cause some disturbance and to place it in a position where people are bound to look at it, they can't help but see it instead of seeing what they came there to see, it is forcing your opinion on somebody else and doing it in a manner that is likely to cause disturbance and I think anything that is likely to cause disturbance is pretty apt to be disorderly conduct. As I said before, I think the Court can draw conclusions on what evidence you've got before you and the relevant undisputed evidence in this case is this. That this Defendant carried this sign and he doesn't know exactly but it probably con-

tained the word "murder"—at a particular place and the manner in which he displayed it not only was likely to cause disturbance, but did cause a disturbance and that is the issue here. It was more than apt to bring about a riot. You have got to consider not only what took place but where it took place and under what circumstances it took place. *So for those reasons* I find him guilty and I'll put a fine of $25.00 and I'm going to give him a jail sentence of six months. The Commonwealth has asked if I give him a jail sentence that it be suspended. I'm going to suspend it and I'm going to suspend it only on the condition that he pay the fine and costs and good behavior for 12 months. (emphasis supplied)

Trial Transcript, May 11, 1972, pp. 173-174.

The unconstitutionality of the Municipal Court's decision is well settled. *Cohen* v. *California*, 403 U.S. 151 (1971). But in order to attack it, Petitioner was forced to appeal to the Corporation Court for the City of Charlottesville and subject himself to further jeopardy in the form of trial de novo, despite the fact that his Municipal Court conviction was indisputably invalid. This Court has recently held that an unconstitutional blemish in a court not of record cannot be cured by the tardy application of constitutional grease paint on trial de novo in a court of record. *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972).

Additionally, the Commonwealth is estopped from bringing evidence which proves facts of which Petitioner was acquitted in his first trial by the rule of collateral estoppel. The parties are the same in both cases and the issue is the same.

It is of course well settled that the doctrine of collateral estoppel is embodied in the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). This protection is given to the citizens of the state by the Fourteenth Amendment. *Waller* v. *Florida*, 397 U.S. 387 (1970), *rehearing denied*, 398 U.S. 914 (1970). Retrial of issues adjudicated in the previous trial is an essential element of double jeopardy protection as is the prohibition of retrial for the same offense. *U.S.* v. *Drevetski*, 338 F. Supp. 403 (D.Ill. 1972); *Ashe* v. *Swenson, supra.*

Petitioner had been acquitted of all conduct except the conduct of display of his sign and he was entitled to be retried only for the allegedly criminal conduct for which he had been convicted by the judge below. *Galloway* v. *Beto*, 421 F.2d 284 (5th Cir. 1970), *cert den*. 400 U.S. 912 (1970).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted

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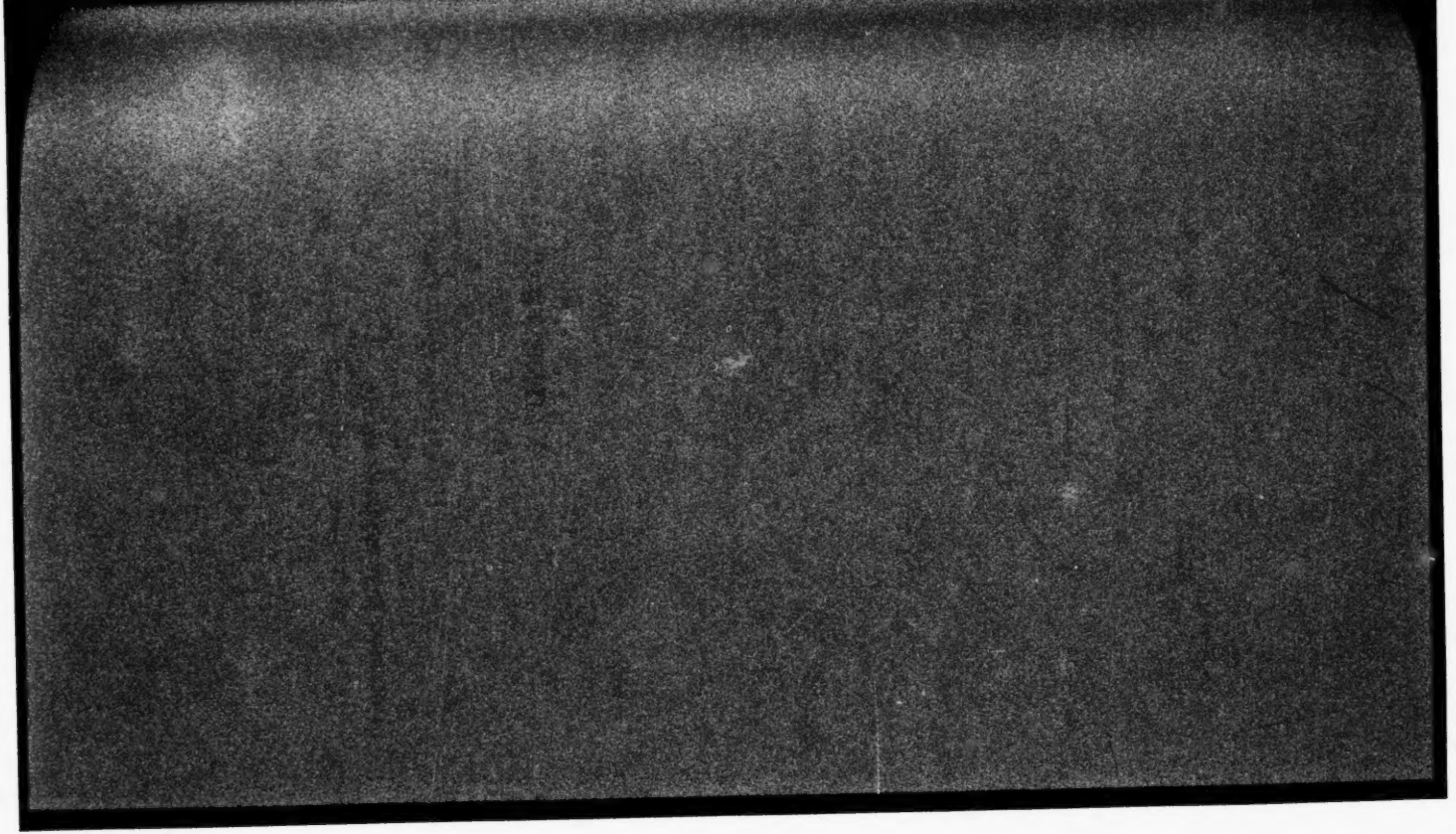

THE CORPORATION COURT
OF THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA — Plaintiff

v. — Appeal—Disorderly conduct

STEPHEN EARL SQUIRE — Defendant
Date of Birth: 4/24/41

On this the 16th day of October, 1972, came the Commonwealth of Virginia by her Attorney and the defendant, Stephen Earl Squire, appeared in court in obedience to his recognizance; likewise appeared John Lowe, attorney for said defendant.

Whereas, on October 13, 1972, the defendant was found guilty of disorderly conduct by a jury and sentenced to pay a fine of $600.00 and be confined in jail for a term of four (4) months, and the Court having fully heard the evidence and argument of counsel and having maturely considered of its judgment doth now impose the said sentence of a $600.00 fine and confinement in jail for a term of four (4) months upon the defendant, which the defendant by counsel noted its exception and renewed its motion to suspend execution of the said sentence, which motion the court took under advisement and Ordered this case continued until further order.

And the defendant was permitted to depart with the same bond in full force and effect.

George M. Coles, Judge

SUPREME COURT OF VIRGINIA

Present: All the Justices

STEPHEN EARL SQUIRE

-v-

PER CURIAM
Richmond, Virginia
October 8, 1973

Record No. 8232
COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE
George M. Coles, Judge

Stephen Earl Squire was tried in the Municipal Court of the City of Charlottesville and convicted of disorderly conduct in violation of Code §18.1-253.2. The offense occurred in Scott Stadium at the University of Virginia in the County of Albemarle and within one mile of the corporate limits of Charlottesville. The defendant appealed to the court below and was again convicted. He is here on a writ of error limited to a consideration of whether or not the Municipal Court of Charlottesville had jurisdiction to try the defendant.

Defendant says the Charter of the City of Charlottesville contains no grant giving its municipal court jurisdiction over misdemeanors committed within one mile of the city limits, and that no such jurisdiction is conferred on the municipal court by the general law. He then argues that

the jurisdiction of the court below is derivative and that since the municipal court was without jurisdiction in the first instance the corporation court did not have jurisdiction on appeal.

Section 33 of the Charter of the City of Charlottesville provides in part that "The judge of the municipal court of said city . . . shall have such jurisdiction as is provided by general law . . . . "

Code §16.1-124 provides in part: "Each municipal court having jurisdiction of criminal matters shall have: . . . (4) Such other jurisdiction, exclusive or concurrent, as may be conferred upon it by general law, or by the provisions of its municipal charter."

Code §15.1-141 provides in part that "The jurisdiction of the corporate authorities of each town or city, in criminal matters, shall extend one mile beyond the corporate limits of such town or city . . . . "

In *Murray* v. *Roanoke*, 192 Va. 321, 64 S. E. 2d 804 (1951), the city sought to convict a defendant upon a warrant charging him with keeping a gambling house in violation of the city code, the offense admittedly having occurred in the County of Roanoke outside the corporate limits of the city. In reversing and dismissing the conviction, we said:

> "We find nothing in the charter of the city of Roanoke, which expressly or impliedly gives extraterritorial effect to its ordinances or empowers the city to enact ordinances effective beyond its corporate limits. Its ordinances do not of themselves purport to extend their provisions beyond the borders of the city.

> "Code, sections 15-560 [presently §15.1-141] and 17-139 do not purport to extend the effect of municipal ordinances beyond the corporate limits of a city. They are statutes of enforcement of the effective law within the area specified. Their purpose is plain, that is, to prevent the territory contiguous to a city from becoming a refuge for criminals, and to confer on the corporation courts of cities power to enforce the police regulations and law of the area involved." 192 Va. at 326-27, 64 S.E. 2d at 808.

It will be noted that we expressly said that Code §15.1-141 is a statute of enforcement of *the effective law within the area specified*, and in setting forth the purpose of the statute, we referred to corporation *courts* of cities, using the plural. We meant courts not of record as well as courts of record. The effective law involved here is a state law concerning disorderly conduct, a criminal matter, and the area is a college stadium located within one mile of Charlottesville.

Code §15.1-141 deals with "jurisdiction" in "criminal matters" and how far such jurisdiction "extends". In *Murray*, and referring specifically to the statute and the meaning of jurisdiction as used therein, we said:

> "The question involved arises in the confusion of the meaning of the word 'jurisdiction,' employed in the statutes. 'Jurisdiction,' as applied to judicial proceedings, broadly means the power, right, or authority in the courts to hear, determine, and enforce the law in cases, causes or controversies. It is the power to try and declare the law. It is the authority by which judi-

cial officers take cognizance of, and apply and enforce the law as distinguished from the power to enact law. [Citing authorities.]" 192 Va. at 327, 64 S.E. 2d at 808.

In the instant case we are considering "jurisdiction as applied to judicial proceedings"—the power, right and authority of a municipal court in Charlottesville to try the defendant.

The reliance by defendant upon Code §15.1-887[1] is misplaced. The General Assembly, by an Act approved April 3, 1962, revised, rearranged, amended and recodified the general laws of Virginia relating to counties, cities and towns. Va. Acts of Assembly 1962, ch. 623. Code §15.1-141 was reenacted and is included in the chapter and article that deal with "police and public order" in cities and towns. Code §15.1-887 was reenacted and is included in an article which grants municipal corporations the power to provide and operate certain public facilities within or without the corporate limits, and provides that the lands and

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[1] "§15.1-887. *Police jurisdiction over lands, buildings and structures; jurisdiction of offenses; appeals.*—Lands, buildings or structures used for any purpose defined in this article shall be under police jurisdiction of the municipal corporation for the enforcement of its regulations respecting the use of occupancy thereof. All regular and special police officers of the municipal corporation shall have jurisdiction to make arrests on such land and in such buildings or structures for violations of such regulations. The municipal court having criminal jurisdiction in the municipal corporation shall have jurisdiction in all cases arising thereunder within the municipal corporation, and the county court of the county wherein the offence was committed shall have jurisdiction of such cases arising without the municipal corporation. Appeals may be taken in such cases to the court of record having jurisdiction. (Code 1950 (Suppl.), §15-77.51; 1958, c. 328; 1962, c. 623.)"

buildings used should be under the police jurisdiction of the municipal corporation for the enforcement of its *regulations* respecting the *use* or *occupancy* thereof. The statute gives authority to police officers of the municipal corporation to make arrests on its land and facilities for any *violation of such regulations*. It then provides that municipal courts having criminal jurisdiction in the municipal corporation shall have jurisdiction of all cases arising thereunder within the corporation, and that county courts shall have such jurisdiction if the offense is committed in the county and without the corporate limits of the municipal corporation.

We are not concerned here with a municipal ordinance, or with the enforcement of any regulations of the City of Charlottesville respecting the use or occupancy of any facility described in Article 5, Chapter 18 of Chapter 623, Acts of the 1962 General Assembly (§§15.1-873-887 Code of Virginia). The defendant is being prosecuted for the violation of a state criminal statute.

The municipal court of Charlottesville had jurisdiction to try Squire originally and the court below had jurisdiction on appeal.

The judgment of the lower court is

Affirmed.

APR 12 1974

In The

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October Term, 1973

No. 73-1204

STEPHEN EARL SQUIRE,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1204

STEPHEN EARL SQUIRE,
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v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on October 8, 1973, not be granted.

OPINION BELOW

The opinion of the Supreme Court of V rginia is reported at 214 Va. 260 (1973).

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

Is The Virginia Disorderly Conduct Statute Unconstitutionally Vague Or Overbroad?

II.

Was The Petitioner Denied Due Process As A Result Of Juror Bernet's Not Being Struck?

III.

Was The Petitioner Subjected To Double Jeopardy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18.1-253.2 Code of Virginia (1950), as amended provides as follows:

If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the preceding section (§ 18.1-253.1), or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.

Section 18.1-255 Code of Virginia (1950), as amended, provides as follows:

If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five hundred dollars, in the discretion of the jury or the judge trying the case without a jury.

Section 16.1-136 Code of Virginia (1950), as amended, provides as follows:

"Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court."

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case as pre sented by the Petitioner, except that on or before the tim Petitioner was arrested, a crowd had gathered.

Further, Respondent disagrees with Petitioner's state ment that the Municipal Court of the City of Charlottes ville found that the Petitioner was guilty only because h had carried a sign accusing the military of murder.

Lastly, as to the *voir dire* examination of the Juro Bernet, the juror testified that, in effect, he was speakin generally and not in connection with a specific case. Th juror further stated that he would listen to both sides o the case impartially. The Trial Court asked the juro whether his decision would depend upon surrounding ci cumstances and on all the circumstances of the case. Th juror answered the question in the affirmative.

ARGUMENT

I.

The Virginia Disorderly Conduct Statute Is Not Unconstitutionally Vague Or Overbroad.

Section 18.1-253.2, Code of Virginia (1950), as amende provides, in pertinent part, as follows:

> "If any person behaves in a riotous or disorderly ma ner in any street, highway, public building, or oth public place, other than those mentioned in the pr ceding section (§ 18.1-253.1) . . . he shall be guilty o misdemeanor."

When a State court has provided a construction of state statute, that construction is binding upon the Unit States Supreme Court. *Gooding* v. *Wilson,* 405 U.S. 5

92 S.Ct. 1103 (1972); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 62 S.Ct. 766 (1942).

In *Hackney* v. *Commonwealth,* 186 Va. 888, 45 S.E.2d 241 (1947), the Supreme Court of Virginia stated in 186 Va. at p. 892, 45 S.E.2d at p. 243, as follows:

> "While the statute is penal and must be construed strictly against the Commonwealth, the dominant purpose of its enactment was to preserve peace and good order. . . . A person violates a statute if . . . his conduct is such as tends to corrupt public morals or to outrage the sense of decency of others. . . ."

Further defining the limits of the statute, the court in *Taylor* v. *Commonwealth,* 187 Va. 214, 46 S.E.2d 384 (1948), in reversing a conviction under the statute, stated that the defendant "had not disturbed any person or persons, or caused any commotion affecting in any degree, the peace and good order. . . ." The Court further stated that neither the words nor the acts of the defendant had a vicious or injurious tendency, offensive to good morals or public decency and that the defendant was guilty of no definite misbehavior or misconduct in the sense that she was disorderly or turbulent.

In *Mercer* v. *Winston,* 214 Va. 281, ... S.E.2d ..... (1973), the Supreme Court of Virginia interpreted § 18.1-255, which provides as follows:

> "If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five

hundred dollars, in the discretion of the jury or the judge trying the case without a jury."

The Court limited the statute's application to "words that have a direct tendency to cause acts of violence by the person to whom, "individually, the remark is addressed." The Court then held the statute not to violate the First or Fourteenth Amendments to the United States Constitution. The Court considered *Gooding, supra,* in so holding.

It is submitted that the interpretation of the breach of peace statute by the Supreme Court of Virginia serves as an interpretation as to what conduct or words are proscribed by § 18.1-253.2.

The language of the statute as construed by the Supreme Court of Virginia is not unconstitutionally vague and overbroad and consequently in violation of the First and Fourteenth Amendments of the United States Constitution.

The statute does not extend to punishment for the expression of unpopular views. It does proscribe words or conduct that would have a direct tendency to cause acts of violence by the person to whom, individually, the remark or conduct is addressed and thus is aimed at protecting public peace and good order and at prohibiting breeches of the peace. It is aimed only at "fighting words." The words, as used in the statute, "riotous or disorderly," are thus neither vague or ambiguous and do not in any fashion proscribe constitutionally protected conduct or speech.

The jury was instructed that disorderly conduct was "behavior as tends to disturb public peace or good order." (Tr. 209). The jury was further instructed that the language on the sign carried by the defendant (Petitioner) would not be the subject of a disorderly conviction by itself (Tr. 210). Those instructions to the jury properly limited and defined the terms of the statute.

Petitioner held a 30 foot long sign 10 feet high. The sign blocked the view of spectators of the events on the field. Petitioner, when asked to move, did not do so. A scuffle ensued and a crowd gathered. The Constitution does not have the effect of affording no protection to those who desire to have the public peace and good order protected.

II.

The Petitioner Was Not Denied Due Process As A Result Of Juror Bernet's Not Being Struck.

Petitioner complains that Juror Bernet was not struck from the jury. Counsel for the Petitioner had asked the jury whether they would believe the testimony of a police officer to be more credible inherently than that of an anti-war demonstrator. After the question, the juror raised his hand.

The juror then stated that the "reason I raised my hand I think was not so much against a war demonstrator as in favor of a police officer." (Transcript, p. 8). She further stated: "A police officer I think would have to be older, more settled is my only reason for answering..." (Tr. 8).

The juror was then asked whether if it had been known that the defendant was an anti-war demonstrator his answer would have been different as to whether he thought he could give a fair trial to both sides. He stated that his answer would be the same (Tr. 11).

The juror further stated, "I think maybe one thing is I was stating as a whole class, not in specific examples. I would certainly listen to what the police officer had to say and I would certainly listen to what the anti-war demonstrator had to say and would try to do this impartially." (Tr. 11). When questioned from the bench, he stated that his decision would depend in a particular case on surround-

ing circumstances and on all the circumstances of the case (Tr. 11).

Counsel for the Petitioner was simply asking the juror as to what weight he would attach to the testimony of particular witnesses. Nothing in the answer given by the juror showed that he could not decide the case fairly and impartially. This is not a case where the juror would have contributed to a tribunal "organized to convict." *Fay* v. *New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947).

In *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961), this Court stated that to hold that a mere existence of a preconceived notion as to the guilt or innocence of a defendant, without more, was insufficient to rebut the presumption of a prospective juror's impartiality. This Court further stated that it was sufficient if a juror could lay aside his impression or opinion and render a verdict based on the evidence presented.

It is submitted that a review of the full *voir dire* testimony of the juror could lead one to only one conclusion—that the juror could impartially try the case.

III.

The Petitioner Was Not Subjected To Double Jeopardy.

Petitioner asserts that the decision of the Municipal Court for the City of Charlottesville was unconstitutional for the reasons set forth in Argument I.

The Commonwealth of Virginia has a two tier system of courts. Section 16.1-136 Code of Virginia (1950), as amended, provides as follows:

> "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or

judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court."

In *Colton* v. *Kentucky,* 407 U.S. 104, 92 S.Ct. 1953 (1972), this Court held that in such systems involving a *de novo* trial on "appeal" did not violate the Double Jeopardy Clause of the United States Constitution. The Commonwealth has such a *de novo* system. Section 16.1-136, *supra.*

Petitioner in the Corporation Court for the City of Charlottesville was not convicted of a greater or different offense other than that which he was originally charged and convicted in the Municipal Court.

It is submitted that *Colten* is dispositive of the issue. It has been held that Virginia's procedure is sufficiently analogous to the Kentucky procedure to be governed by the *Colten, supra,* decision. *McClung* v. *Weatherholtz,* 351 F. Supp. 5 (W.D. Va. 1972).

Petitioner cites *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970). This Court in that case held that the Fifth Amendment prohibits the re-trial of issues already litigated when a new and different offense is charged. In the case at bar, the Petitioner was always charged with only one offense.

Waller v. *Florida,* 397 U.S. 387, 90 S.Ct. 1184 (1970), cited by the Petitioner, merely held that one could not be charged for the same offense in both a municipal and state court. That case is inapposite to the case at bar.

Petitioner elected to accept a *de novo* trial. He could not claim the benefits of the *de novo* trial and at the same time argue that the Commonwealth is denied the benefits thereof. *McClung, supra.*

Lastly, a reading of the decision of the Municipal Court (Tr. 5/11/72 pp. 173-174) indicates that Petitioner's statement that he was acquitted of all conduct except conduct of display of his sign is not borne out thereby. A careful reading of the decision of the Municipal Court clearly indicates that the decision was based on more than the mere display of the sign.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 12th day of April, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to each of the following:

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